Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The Supreme Court of the United States

GREGORY OXENDINE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A *WRIT* OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR *WRIT* OF *CERTIORARI*

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QUESTION PRESENTED FOR REVIEW

Does a federal court of appeals have jurisdiction to review an order entered by a district court in response to a motion for reduction of sentence submitted by the government under Rule 35(b) of the Federal Rules of Criminal Procedure?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS AND ORDERS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

REASON FOR GRANTING THE WRIT

THIS COURT SHOULD HEAR THIS CASE TO RESOLVE THE CURRENT DISPUTE IN THE COURTS OF APPEALS REGARDING WHETHER A COURT OF APPEALS MAY REVIEW A DISTRICT COURT'S RULING ON A MOTION FOR REDUCTION OF SENTENCE UNDER RULE 35(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE 7

TABLE OF CONTENTS (CONT'D)

Page

CONCLUSION 14

APPENDIX A-1

TABLE OF AUTHORITIES

Cases **Page**

Berman v. United States, 302 U.S. 211 (1937) 8

Parr v. United States, 351 U.S. 513 (1956) 8

United States v. Arishi, 54 F.3d 596 (9th Cir. 1995) 11

United States v. Bedrosian, 631 F.2d 582 (8th Cir. 1980) .. 8

United States v. Campbell, 711 F.2d 159 (11th Cir. 1983) .. 8

United States v. DeCologero, 821 F.2d 39 (1st Cir. 1987) .. 8

United States v. Distasio, 820 F.2d 20 (1st Cir. 1987) 13

United States v. Doe, 93 F.3d 67 (2d Cir. 1996),
cert. denied, 117 S. Ct. 944 (1997) 10

United States v. Gereau, 603 F.2d 438 (3d Cir. 1979) 8

United States v. Graham, 946 F.2d 19 (4th Cir. 1991) 11

United States v. Lee, 46 F.3d 674 (7th Cir. 1995),
criticized in United States v. McDowell,
117 F.3d 974 (7th Cir. 1997) 11, 13

TABLE OF AUTHORITIES (CONT'D)

Cases **Page**

United States v. Manella, 86 F.3d 201 (11th Cir. 1996) . . . 11

United States v. McAndrews, 12 F.3d 273 (1st Cir. 1993) 8, 11, 12

United States v. Pridgen, 64 F.3d 147 (4th Cir. 1995) . . 6, 10

Statutes

Fed. R. Crim. P. 35 . . . . . passim

18 U.S.C. § 3742 . . . . . 3, 8, 9, 11

18 U.S.C. § 922 4

18 U.S.C. § 924 4

21 U.S.C. § 846 4

28 U.S.C. § 1254 1

28 U.S.C. § 1291 . . . . . 2, 7, 11, 13

TABLE OF AUTHORITIES (CONT'D)

Statutes **Page**

S. Rep. No. 225, 98th Cong., 2d Sess. (1983), *reprinted in* U.S.C.C.A.N. 3182 10

Sup. Ct. R. 10 14

U.S.S.G. § 5K1.1 ..... 11, 12

OPINIONS AND ORDERS BELOW

The per curiam opinion of the United States Court of Appeals for the Fourth Circuit, dated May 4, 2000, will not be published. It is set out in the Appendix at page A-1.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit upholding the Petitioner's sentence was issued on May 4, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 35(b) of the Federal Rules of Criminal Procedure provides:

> **(b) Reduction of Sentence for Substantial Assistance.** If the Government so moves within one year after the sentence is imposed, the court may reduce a sentence to reflect a defendant's subsequent substantial assistance in investigating or prosecuting another person, in accordance with the guidelines and policy statements issued by the Sentencing Commission under 28 U.S.C. § 994. The court may consider a government motion to

reduce a sentence made one year or more after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after sentence is imposed. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's presentence assistance. In applying this subdivision, the court may reduce the sentence to a level below that established by statute as a minimum sentence.

28 U.S.C. § 1291 states:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

18 U.S.C. § 3742(a) provides:

§ 3742. Review of a sentence

(a) Appeal by a defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

STATEMENT OF THE CASE

In 1997, the Petitioner, Gregory Oxendine, was indicted on charges of conspiracy to distribute cocaine, in violation of 21 U.S.C. § 846, and possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. §§ 922(g) and 924(a). In April 1998, Oxendine entered a plea of guilty to the conspiracy charge in exchange for the government's promises to drop the firearms charge and to file a motion to reduce his sentence under Fed. R. Crim. P. 35(b) if Oxendine cooperated with law enforcement officials in attempting to apprehend certain major drug dealers. The district court accepted Oxendine's guilty plea, and, on June 29, 1998, the court sentenced Oxendine to a term of 92 months in prison, plus a term of 5 years of supervised release. Pursuant to the plea agreement, Oxendine then arranged a series of difficult, dangerous, and potentially life-threatening drug deals which resulted in the arrest and conviction of two major drug dealers. Oxendine was placed in more than the typical amount of danger in these buys. Oxendine also engaged in other attempts to make drug purchases which, for reasons unrelated to Oxendine's efforts, did not result in arrests.

As a result of these efforts by Oxendine, the government filed a motion under Rule 35(b) which was heard

at a hearing on August 17, 1999. During the hearing, the government argued that Oxendine was entitled to a reduction in his sentence but tempered its recommendation for a reduction with repeated testimony which alleged that Oxendine's assistance was belated and that he could have been more helpful. In particular, a DEA agent testified regarding Oxendine's cooperation but also repeatedly emphasized Oxendine's lack of cooperation prior to his conviction and initial sentencing.

In reaching its decision regarding the extent to which it would adjust Oxendine's sentence downward, the district court never indicated that it was not improperly influenced by this negative testimony regarding Oxendine's presentence conduct, stating simply that it would reduce Oxendine's sentence by 32 months.

Oxendine subsequently attempted to appeal the district court's Rule 35(b) order, arguing to the United States Court of Appeals for the Fourth Circuit that (1) the district court improperly considered the DEA agent's statements that Oxendine's assistance was belated, and (2) the district court abused its discretion in the meager extent to which it reduced Oxendine's sentence because Oxendine's cooperation with the DEA was extraordinarily helpful, enabling the DEA to apprehend two major figures in the distribution of drugs in South Carolina, and because his assistance was so dangerous and life-threatening to Oxendine.

Citing to the holding in the Fourth Circuit's earlier decision in *United States v. Pridgen,* 64 F.3d 147 (4th Cir. 1995), the court of appeals ruled summarily that it lacked jurisdiction to review a district court's order granting a reduction in sentence under Rule 35(b), and dismissed the appeal for want of jurisdiction.

REASON FOR GRANTING THE WRIT

THIS COURT SHOULD HEAR THIS CASE TO RESOLVE THE CURRENT DISPUTE IN THE COURTS OF APPEALS REGARDING WHETHER A COURT OF APPEALS MAY REVIEW A DISTRICT COURT'S RULING ON A MOTION FOR REDUCTION OF SENTENCE UNDER RULE 35(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

The decision of the Fourth Circuit in this case, dismissing for lack of jurisdiction Petitioner Gregory Oxendine's appeal from the district court's order granting the government's motion for reduction of sentence under Rule 35(b) of the Federal Rules of Criminal Procedure, squarely conflicts with the rulings of other courts of appeals on the same issue. In addition, because the issue presented by this case can arise every time that a criminal defendant in federal court seeks a reduction in sentence on the basis of his or her postsentencing cooperation with law enforcement officials, the issue of the jurisdiction to review Rule 35(b) orders is an important one with widespread application. This case thus presents a compelling issue requiring action by this Court in order to resolve a conflict in the circuits.

Pursuant to the provisions of 28 U.S.C. § 1291, federal courts of appeals have jurisdiction over "appeals from all final

decisions of the district courts." Prior to 1984, it was well recognized by this Court that in a criminal case the imposition of a sentence upon a defendant constituted a final decision within the meaning of § 1291, *Parr v. United States*, 351 U.S. 513, 518 (1956); *Berman v. United States*, 302 U.S. 211, 212-13 (1937), and, based on the jurisdiction provided by § 1291, for many years all circuit courts of appeals reviewed district court orders disposing of Rule 35(b) motions for an abuse of discretion. *See, e.g., United States v. DeCologero,* 821 F.2d 39 (1st Cir. 1987); *United States v. Gereau*, 603 F.2d 438 (3d Cir. 1979); *United States v. Guglielmi*, 929 F.2d 1001 (4th Cir. 1991); *United States v. Bedrosian*, 631 F.2d 582 (8th Cir. 1980); *United States v. Campbell*, 711 F.2d 159 (11th Cir. 1983).

With the passage of the Sentencing Reform Act of 1984, which created the United States Sentencing Guidelines, Congress added a new and more specific jurisdictional section intended to govern the appeals of sentences imposed under the guidelines. That statute, 18 U.S.C. § 3742, has altered prior criminal appeal practice in two ways, by narrowing the types of sentences that can be appealed and by simultaneously enlarging the grounds for appealing the remaining types of sentences. *United States v. McAndrews*, 12 F.3d 273, 277 (1st Cir. 1993). The statute provides in pertinent part:

§ 3742. Review of a sentence

(a) Appeal by a defendant.—A defendant may file a notice of appeal in the

district court for review of an otherwise final sentence if the sentence—

> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or
>
> (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

18 U.S.C. § 3742(a). The legislative history of § 3742 reveals that Congress intended that

> section 3742 create[ ] for the first time a comprehensive system of review of sentences that permits the appellate process to focus attention on those sentences whose review is crucial to the function of the sentencing guidelines system, while also providing adequate means for *correction of erroneous and clearly unreasonable sentences.*

S. Rep. No. 225, 98th Cong., 2d Sess. (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3338 (emphasis added).

In *United States v. Pridgen*, 64 F.3d 147 (4th Cir. 1995), relied upon by the Fourth Circuit in its opinion below, the court concluded that § 3742(a) applied not just to a district court's initial imposition of sentence but also to a district court's ruling on a Rule 35(b) motion. The court found that because of the absence in § 3742(a) of any basis for review of a Rule 35(b) ruling in the case before it, it had no jurisdiction to consider the appeal of the district court's summary denial of a Rule 35(b) motion submitted by the government on behalf of the defendant. In reaching its decision, the court in *Pridgen* held that any conclusion that § 3742(a) permitted the review of a Rule 35(b) order would conflict with the clearly established policy recognized by courts that, under the United States Sentencing Guidelines, a court of appeals could not review the extent of a downward departure under U.S.S.G. § 5K1.1 at a defendant's initial sentence. 64 F.3d at 149 *(citing United States v. Graham*, 946 F.2d 19 (4th Cir. 1991)).

The *Pridgen* decision, while followed by some other circuit courts, *see United States v. Doe*, 93 F.3d 67 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 944 (1997); *United States v. Arishi*, 54 F.3d 596 (9th Cir. 1995); *United States v. Manella*, 86 F.3d 201 (11th Cir. 1996), does not represent the better view on the issue of the appealability of a district court's ruling on a Rule 35(b) motion. The better view is expressed in the holdings of *United States v. McAndrews* and *United States v. Lee*, 46 F.3d 674 (7th Cir. 1995), *criticized in United States v. McDowell*, 117 F.3d 974 (7th Cir. 1997). In *McAndrews*, the First Circuit squarely addressed the issue of jurisdiction to consider a Rule 35(b) motion ruling and held that although the extent of downward departures under U.S.S.G. § 5K1.1 cannot be appealed, "Rule 35(b) is a horse of a different hue." 12 F.3d at 277. The court reasoned:

> By definition, a sentence must already have been imposed before Rule 35(b) can be invoked and a sentence reduction contemplated. It follows that the appealability of an order resolving a Rule 35(b) motion is not controlled by 18 U.S.C. § 3742 because such an order is not, properly speaking, a sentence. Rather, appealability in such circumstances, like appealability with respect to the disposition of virtually all other post-judgment motions, is governed by 28 U.S.C. § 1291. And an order resolving a Rule 35(b) motion satisfies the preconditions established by section 1291, for

> entry of the order leaves nothing further to be done. *See United States v. Metropolitan Dist. Comm'n*, 847 F.2d 12, 14 (1st Cir.1988) (elucidating "general rule" that an order becomes final and appealable when a court resolves a contested matter, leaving nothing further to be done) (citing, *inter alia*, *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633-34, 89 L.Ed. 911 (1945)). *An order granting or denying a Rule 35(b) motion is, thus, a final decision for purposes of section 1291.*

Id. (emphasis added; footnote omitted). Citing a number of prior decisions in which the court reviewed postjudgment motions, the court in *McAndrews* further pointed out that its analysis was in accord with the general principle, taken for granted in both criminal and civil jurisprudence, that rulings disposing of motions which seek to alter preexisting judgments are appealable. Because of this precedent, the court found particularly unpersuasive the government's attempt to analogize sentence reductions to downward departures for substantial assistance: "[E]ven in an era dominated by the sentencing guidelines, an order granting or denying a timely motion for a sentence reduction, unlike certain analogous departure decisions, remains appealable." *Id.* at 278. The court thus concluded:

> We hold, therefore, that we have jurisdiction to hear a timely appeal in which a

> prevailing defendant complains that the district court acted too grudgingly in dispensing relief under Rule 35(b).

Id. at 279; *accord United States v. Lee,* 46 F.3d at 681 (reversing trial court's denial of government's Rule 35(b) motion because "the trial court abused its discretion in the manner in which it conducted the hearing which resulted in the denial of relief"); *see also United States v. Distasio*, 820 F.2d 20, 24 (1st Cir. 1987) ("An unjust sentence reduction should be open to the same review as no reduction at all.").

The conflict in these decisions squarely presents the type of compelling issue contemplated by Sup. Ct. R. 10 as appropriate and necessary for review on a writ of certiorari. Currently, the review afforded to a criminal defendant in Rule 35(b) cases varies, depending solely on the circuit in which the defendant was convicted. Therefore, the Court should agree to review the decision of the Fourth Circuit below in order to resolve the conflict in the circuits on this issue and to establish that federal criminal defendants may appeal Rule 35(b) rulings to the courts of appeals under 28 U.S.C. § 1291.

CONCLUSION

For all of the foregoing reasons, the Petitioner, Gregory Oxendine, requests this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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TABLE OF CONTENTS

Opinion of the Fourth Circuit Court of Appeals A-1

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. No. 99-4628

GREGORY OXENDINE,

Defendant-Appellant.

Appeal from the United States District Court for the District of South Carolina, at Florence. C. Weston Houck, Chief District Judge. (CR-97-559)

Submitted: April 27, 2000

Decided: May 4, 2000

Before NIEMEYER and MOTZ, Circuit Judges, and BUTNZER, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

COUNSEL

Debra Owens Jackson, Florence, South Carolina, for Appellant. J. Rene Josey, United States Attorney, Robert H. Bickerton, Assistant United States Attorney, Charleston, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Gregory Oxendine pled guilty to conspiracy to possess with intent to distribute and to distribute cocaine in violation of 21 U.S.C. § 846 (1994), and was sentenced to a term of ninety-two months incarceration, but was continued on bond to allow him to continue cooperation with the government. The government later moved for a reduction of sentence pursuant to Rule 35(b), Federal Rules of Criminal Procedure, based on his substantial assistance. The district court granted the motion and reduced Oxendine's sentence to sixty months. Oxendine appeals the reduced sentence, challenging the extent of the district court's reduction. We find that we lack jurisdiction to review the extent of the reduction. *See* 18 U.S.C. § 3741(a) (1994); *see also United States v. Pridgen*, 64 F.3d 147, 149-50 (4th Cir, 1995) (finding that appellant review of extent of downward departure is not authorized under § 3742(a)).

We therefore dismiss the appeal for lack of jurisdiction. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would nota id the decisional process.

DISMISSED